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No. 03-1488

IN THE

Supreme Court of the United States

ULYSSES TORY, *et al.*,
Petitioners,

v.

JOHNNIE COCHRAN, JR.,
Respondent.

On Writ of Certiorari to the Court of Appeal of California, Second Appellate District

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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The American Federation of Labor and Congress of Industrial Organizations, a federation of 60 national and international labor organizations with a total membership of approximately 13 million working men and women, files this brief *amicus curiae* in support of Petitioners with the consent of the parties as provided for in the Rules of this Court.[1]

[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In this defamation case, the courts below—based on their ruling that Ulysses Tory had made libelous and slanderous statements concerning Johnnie Cochran—issued a broad injunction barring Tory from making any public statements concerning Cochran. That injunction—which prohibits Tory from making statements concerning Cochran that have not been found to be defamatory and constitutionally unprotected and, indeed, prohibits Tory from making statements concerning Cochran that would be constitutionally protected—is clearly an unconstitutional prior restraint on speech. Such an injunction cannot rest on the defendant's prior publication of defamatory statements. Under *Near v. Minnesota*, 283 U.S. 697 (1931), injunctions suppressing speech cannot be justified on the ground that the defendant had previously engaged in unprotected speech.

It does not follow, however, that every defamation case injunction restraining speech constitutes an impermissible prior restraint. As suggested by the *Restatement (Second) of Torts*, vol. 3, p. 329 (1977), "a carefully worded injunction . . . against further publication of [a] statement that has already been determined by the court to be false and defamatory" and unprotected by the First Amendment would not constitute a prior restraint on speech. Such an injunction would prohibit only republication of statements that the court had formally determined after the fact to be defamatory and unprotected.

No broader injunction, however, would be consistent with the First Amendment. To pass constitutional muster, a defamation case injunction must be limited to barring *only* "the repetition of specifically identified prior statements that had been finally determined to [be] libelous." *Metropolitan Opera Association v. Local 100, Hotel Employees and Restaurant Employees*, 239 F.3d 172, 178 (2d Cir. 2001).

The injunction here can not pass that muster and the judgment below sustaining that injunction is due to be reversed.

ARGUMENT

In this defamation case brought by Johnnie Cochran, a prominent California lawyer, the courts below ruled that the defendant Ulysses Tory had made "pervasive use of libelous and slanderous statements" concerning Cochran. Pet. App. A7. On that basis, those courts "permanently enjoined" Tory and "all persons acting in concert, cooperation or participation with him" from "displaying signs, placards or other written or printed material about Cochran and/or Cochran's law firm" and from "orally uttering statements about Cochran and/or Cochran's law firm" in "any public forum." *Id.* at A13.[2]

That defamation case injunction offends the First Amendment. While the Constitution does not bar a defamation case court from issuing a precisely framed injunction against the defendant's republication of the particular statements about the plaintiff the court has found to be defamatory and unprotected by the First Amendment, a broadly gauged injunction against the defendant's publication of statements about the plaintiff generally is an unconstitutional prior restraint on speech.

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[2] The courts below also permanently enjoined Tory and all persons acting in concert with him from "[s]tanding, assembling or approaching within three hundred (300) yards of (i) Cochran[] or (ii) Cochran's place of business" and from "[c]ontracting, harassing, threatening, stalking, disturbing the peace of, keeping under surveillance or blocking the movements of Cochran." Pet. App. A13. Because the foregoing injunctive provisions have not been challenged here, we do not address whether these provisions—which unlike the challenged provision are *not* content-based restrictions on speech—"burden no more speech than necessary to serve a significant government interest." *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 765 (1994).

1. In *Crosby v. Bradstreet Co.*, 312 F.2d 483, 484 (2d Cir. 1963), the Second Circuit considered the constitutionality of a defamation case injunction like the injunction here, *viz.*, an injunction requiring a defamation defendant to "refrain from issuing or publishing any report, comment or statement either in writing or otherwise concerning [named persons] or concerning the business activities of any of the foregoing persons." What the Second Circuit said in vacating that injunction applies fully to the injunction in this case:

> "Such an injunction, enforceable through the contempt power, constitutes a prior restraint . . . against the publication of facts which the community has a right to know and which [the defendant] had and has the right to publish" and is "in violation of the First Amendment to the Constitution." *Id.* at 485.

The *Crosby* Court could not have been more correct. "[C]ourt orders that actually forbid speech activities" are "classic examples of prior restraints," *Alexander v. United States*, 509 U.S. 544, 550 (1993), and such restraints "are the most serious and the least tolerable infringement on First Amendment rights," *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 559 (1976). As this Court has emphasized, "The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment." *Pittsburgh Press Co. v. Human Rel. Comm'n*, 413 U.S. 376, 390 (1973).

A broadly gauged injunction against the future publication of statements about a third party generally by a defendant who has published defamatory and untrue statements in the past—no less than such an injunction against a defendant who has not published such statements—is an impermissible prior restraint. "The special vice of [such an injunction] is that communication will be suppressed . . . before an adequate determination that [the communication] is unprotected by the First Amendment." *Pittsburgh Press*, 413 U.S. at 390.

Indeed, the whole point of such an injunction is to suppress the defamation case defendant's future publication of any statement about the plaintiff without regard to whether the suppressed statement would be protected by the First Amendment, i.e., without regard to whether the statement would constitute "the publication of facts which the community has a right to know and which [the defendant] had and has the right to publish." *Crosby*, 312 F.2d at 485.

Such a broadly gauged injunction cannot rest on the defendant's prior publication of defamatory statements. This Court has repeatedly held that injunctions suppressing speech cannot be justified on the ground that the defendant had previously engaged in unprotected speech. In *Near v. Minnesota*, 283 U.S. 697, 713 (1931), the Court held that a newspaper's prior publication of "scandalous and defamatory matter" did not justify "censorship" of its future publications. In *Vance v. Universal Amusement Co.*, 445 U.S. 308, 311 (1980), moreover, the Court sustained a lower court decision applying *Near* to invalidate "statutes authoriz[ing] state judges, on the basis of a showing that obscene films have been exhibited in the past, to prohibit the future exhibition of motion pictures that have not yet been found to be obscene." *See also Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 445 (1957) (explaining that the Minnesota statute in *Near* was unconstitutional because it "empowered its courts to enjoin the dissemination of future issues of a publication because its past issues had been found offensive," and sustaining the New York statute in *Kingsley Books* on the ground that "it studiously withholds restraint upon matters not already published and not yet found to be offensive").

2. This is not to say that every defamation case injunction restraining speech constitutes an unconstitutional prior restraint. To the contrary, we believe that the following suggestion in the "Special Note on Remedies for Defamation Other than Damages" to chapter 27 of the *Restatement*

(Second) of Torts, vol. 3, p. 329 (1977), is consistent with the First Amendment:

> "When it has been formally determined by a court that a statement is both defamatory and untrue and the defendant persists in continuing to publish it, a carefully worded injunction might meet the need and be available against further publication of the statement that has already been determined by the court to be false and defamatory."

A "formal[] determin[ation] by a court that a statement is both defamatory and untrue," *Restatement*, vol. 3, p. 329, is "an adequate [after-the-fact] determination that [the statement] is unprotected by the First Amendment," *Pittsburgh Press*, 413 U.S. at 390. Thus, a "carefully worded injunction" that applies only to "further publication of the statement that has already been determined by the court to be false and defamatory," *Restatement*, vol. 3, p. 329, and unprotected by the First Amendment, cannot be denominated a prior restraint on speech. Such an injunction, moreover, meets the requirement that any "order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate." *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968).

The salient point, as stated by the First Circuit in *Auburn Police Union v. Carpenter*, 8 F.3d 886, 903 (1st Cir. 1993), is this:

> "An injunction that is narrowly tailored, based upon a continuing course of repetitive speech, and granted only after a final adjudication on the merits that the speech is unprotected does not constitute an unlawful prior restraint."

This sound formulation of the constitutional rule carries with it two limitations that go to the essence and that are worthy of emphasis.

First, a defamation case injunction that is *not* narrowly limited to barring only "the repetition of specifically identified prior statements that had been finally determined to [be] libelous" *is* an unconstitutional prior restraint. *Metropolitan Opera Association v. Local 100, Hotel Employees and Restaurant Employees*, 239 F.3d 172, 178 (2d Cir. 2001).

In the *Metropolitan Opera* case, the district court found that HERE Local 100 defamed the Met by falsely suggesting that the Opera was engaged in a primary labor dispute with the Union. On this basis, the district court issued a preliminary "injunction prohibit[ing] the Union and its members generally from 'threatening or harassing' and 'engaging in fraudulent or defamatory representations regarding' the Met, its donors, officers, patrons or directors." 239 F.3d at 174.

The Second Circuit distinguished an "injunction against the repetition of specifically identified prior statements that had been finally determined to [be] libelous" from the injunction issued by the district court on the ground that the district court's "injunction is vague as to what the Union may say and what statements might lead to a finding of contempt of court." *Metropolitan Opera*, 239 F.3d at 178. This vagueness "put[] the Union at risk of punishment for good faith efforts to advocate publicly its position" and left the Union "no way of determining from the text of the injunction whether other chants or statements in the future will lead to further contempt sanctions." *Id.* For that reason, the Second Circuit concluded that "the vagueness of this injunction serve[d] as sufficient reason to require that we vacate it." *Id.*

"As cases decided in this Court have abundantly demonstrated, the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn." *Speiser v. Randall*, 357 U.S. 513, 525 (1958). Thus, as the *Metropolitan Opera* court appreciated, an injunction against "defamatory statements" in general or even "defamatory statements of a similar nature"

to statements that have been found defamatory would create an intolerable risk that protected "communication will be suppressed . . . by inducing excessive caution in the speaker." *Pittsburgh Press*, 413 U.S. at 390.

Second, the necessary initial predicate to the issuance of a "narrowly tailored" injunction prohibiting only speech that has been "finally adjudicat[ed] on the merits" to be defamatory and unprotected, *Carpenter*, 8 F.3d at 903, is a "formal[] determin[ation] by a court that [the enjoined] statement is both defamatory and untrue," *Restatement*, vol. 3, p. 329, and unprotected by the First Amendment. The courts below did *not* make any such "formal determinations" regarding the particular statements published by Tory.

The trial court decision does quote 13 statements published by Tory on placards. Pet. App. A20 ¶ 16. But the majority of these statements—for example, "You've been a BAD, BAD boy Johnnie Cochran" and "Attorney Cochran, Don't We Deserve the Same Justice as O.J.?"—are not statements of fact that are subject to being adjudicated defamatory and untrue. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-340 (1974). Beyond these, the trial court generally characterizes other statements, that it does not quote, as being "untrue, misleading and malicious." Pet. App. A20-A21 ¶18.

To "show[] that Tory 'crossed the line separating protected rhetorical hyperbole from unprotected fraudulent misrepresentations of fact,'" Pet. App. A 9, quoting *San Antonio Hospital v. Southern California Council of Carpenters*, 125 F.3d 1230, 1237 (9th Cir. 1997), the court of appeal, in its turn, cited the following three statements:

> "'Hey, Johnnie, how much did they pay $$ you to f--- me?' and 'Johnnie Cochran, I know what you, the County and City did to my case,' and 'Johnnie is a crook, a liar and a thief.'" *Id.*

However, as Judge Kozinski put it in his *San Antonio Hospital* dissent, these statements reflect nothing worse than

"ambiguity and flamboyance," 125 F.3d at 1240, and cannot be taken as malicious misstatements of fact subject to condemnation as defamatory. Indeed, "the *settings* of the speech in question . . . makes their hyperbolic nature apparent." *Moldea v. New York Times Co.*, 22 F.3d 310, 314 (D.C. Cir. 1994). These three statements were contained on placards displayed in conjunction with other placards conveying obviously hyperbolic assertions about Cochran. "In such a heated and volatile setting, even seemingly 'factual' statements take on an appearance more closely resembling opinion than objective fact." *Steam Press Holdings v. Hawaii Teamsters*, 302 F.3d 998, 1006 (9th Cir. 2002), *cert. denied*, 537 U.S. 1232 (2003).

The decisions below, thus, do not even come close to establishing the necessary initial predicate for a "narrowly tailored" injunction against "a continuing course of repetitive speech" that has been "finally adjudicat[ed] on the merits" to be defamatory and unprotected. *Carpenter*, 8 F.3d at 903. There has been no "formal[] determin[ation] by a court that [any particular enjoined] statement is both defamatory and untrue," *Restatement*, vol. 3, p. 329, and unprotected by the First Amendment. Indeed, many of the statements quoted by the lower courts and condemned as defamatory in general terms did not entail, even by implication, any factual assertion whatsoever. And, those few statements that, in isolation, might be understood to imply untrue factual assertions, could not, in context, be so understood.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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